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Conflict of Law Regarding Revocation of Wills: Mutiny on the Situs Default

John P. Gaset
0@0.com

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CONFLICT OF LAW REGARDING REVOCATION OF WILLS: MUTINY ON THE SITUS DEFAULT

JOHN P. GASET*

“ ‘The land taboo’—what an excellent phrase to describe that curious doctrine, so popular with English and American commentators, that every conceivable question affecting the transfer of title to land must invariably be determined by the domestic law of the situs.”

– Professor Moffatt Hancock¹

Abstract

It is commonplace in our contemporary society for a testator to own realty situated beyond domiciliary borders. Spliced with the traditional choice-of-law baseline—that the law of the situs is used to determine conflicts concerning interests in realty—such a testator is presented with undue revocation complexities. This Note explores those complications, and suggests that they are unnecessarily imposed. They threaten testamentary expectation and fail to further the interests purportedly justifying their existence. As such, this Note argues that a more functional baseline should be employed in lieu of the rigid application of common law currently utilized. By removing situs law application as the default in revocation proceedings, a functional approach alleviates expectation concerns, lowers transaction costs, and leaves legitimate state interests unscathed.

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* J.D. 2012, *magna cum laude*, Florida State University College of Law. Special thanks to Professor Adam Hirsch for helpful comments and discussion.

1. Moffat Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 STAN. L. REV. 1, 1 (1967).

I. INTRODUCTION: FRAMING THE REVOCATION ISSUE

The administration of a will disposing of realty dispersed throughout the nation invokes two distinctly correlated issues: validation and revocation. A will operates as a conveyance or transfer of realty,² but only the state in which property is situated—the situs—has jurisdiction to devolve real property.³ Accordingly, a will devolving realty necessitates ancillary proceedings in each state real property is located, and “the courts in each state will construe it as to the lands located therein as if devised by separate wills.”⁴ To the extent the laws of each state differ, the express intentions of the testator—either in execution or revocation⁵—may not come to fruition.⁶ However, current statutory design has unnecessarily deemed expressions of revocation the greater threat to conscious estate apportionment.

At common law, the validity of a testamentary instrument disposing of immovables⁷ was determined by the law of the situs;⁸ however, the validity of a will of movables was determined by

2. PETER HAY, ET. AL., *CONFLICT OF LAWS* 1294 (5th ed. 2010).

3. 1 JEFFREY A. SCHOENBLUM, *MULTISTATE & MULTINATIONAL ESTATE PLANNING* §14.02 (3d ed. 2006); *see also* *Estate of Lampert v. Estate of Lampert*, 896 P.2d 214, 220 (Alaska 1995) (“[M]atters pertaining to the validity of conveyances of real property are governed by the law of the situs of the property.”).

Any state in which a decedent was domiciled or owned property at the time of his death may probate the decedent’s will. *See, e.g., Biederman v. Cheatham (In re Estate of Biederman)*, 161 So. 2d 538, 541-42 (Fla. 2d DCA 1964). However, this jurisdiction is “not necessarily exclusive.” *Cuevas v. Kelly*, 873 So. 2d 367, 371 (Fla. 2d DCA 2004); *see also* Robert M. Bozeman, *The Conflict of Laws Relating to Wills, Probate Decrees and Estates*, 49 A.B.A. J. 670 (1963). “The courts of a decedent’s domicile do not have jurisdiction to control devolution of real property held in another state” *Stein v. Welch (In re Estate of Stein)*, 896 P.2d 740, 745 (Wash. Ct. App. 1995); *see also* *Phillips v. Phillips*, 104 So. 234, 236 (Ala. 1925) (stating that it is the situs’ “right” to govern wills of its lands). The situs “state alone has final authority to determine title to [its] property.” SCHOENBLUM, *supra*, at 14-6.

4. *Trotter v. Van Pelt*, 198 So. 215, 217 (Fla. 1940); *see also In re Estate of Stein*, 896 P.2d at 745 (“The probate of a nonresident’s will who dies leaving property within the state affects only the property within the jurisdiction and has no effect on the validity of the will itself beyond the limited purpose of the plenary power possessed by the state with respect to property within its domain . . .”).

5. Both execution and revocation are “equally significant” expressions of the testator’s intention. *See* HAY, *supra* note 2, at 1305.

6. *See, e.g., First Presbyterian Church of Sterling, Ill. v. Hodge (In re Barrie’s Estate)*, 35 N.W.2d 658 (Iowa 1949).

7. In choice-of-law idiom, personal property is referred to as “movable[.],” whereas real property is referred to as “immovable[.]” *See, e.g.,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 9, topic 2, intro. note (1971); *id.* § 263. For a discussion on the history and reasons for such classifications, *see* George W. Stumberg, *Testamentary Dispositions and the Conflict of Laws*, 34 TEX. L. REV. 28, 30-33 (1955).

8. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239; *see also Estate of Lampert*, 896 P.2d at 220.

reference to the law of the decedent's domicile at the time of death.⁹ To the testator owning realty situated outside the domiciliary jurisdiction, strict adherence to these traditional rules yielded harsh outcomes. If the formal requirements of the situs and domiciliary differed only slightly, dispositions of real property unnecessarily failed. Moreover, severity was not limited to results: strict adherence was also a "source of inconvenience" that forced compliance with the requirements of devising land in several states.¹⁰ Both considerations prompted almost universal statutory modification away from the common law.¹¹ A variety of adjustments have been utilized,¹² but situs states will now generally validate a foreign will if executed in a manner compliant with "the law at the time of execution of the place where the will [was] executed, or of the law of the place where at the time of execution or at the time of death the testator [was] domiciled."¹³

As the same common law principles that govern execution also apply to revocation,¹⁴ deviation from traditional choice-of-law notions is similarly warranted. Analogous to differing execution requirements, differing revocation laws may affect the intended consequences of actions or events occurring in the non-situs jurisdiction.¹⁵ However, while alleviating execution concerns,¹⁶ modern validation statutes have proven ineffective in shielding issues of revocation from the potentially harsh outcomes or inconveniences of the common law.¹⁷ Though some validation

9. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 263; see also Stumberg, *supra* note 7, at 28. As discussed *infra* in Part III.A.ii., the modern-day justifications for the bifurcation of movables and immovables are probative of situs default abandonment.

10. HAY, *supra* note 2, at 1294-95; see also SCHOENBLUM, *supra* note 3, at 14-4.

11. Indeed, "[t]he motivation for looking beyond situs law has been the sensible attitude that a testator should not be required, each time he acquires real property in another foreign jurisdiction, to execute a will in order to comply with minor technical formalities of the situs' wills law." SCHOENBLUM, *supra* note 3, at 14-4; see also HAY, *supra* note 2, at 1294-95.

12. For an illustration of the various validation statutes adopted, see SCHOENBLUM, *supra* note 3, at 14-4 to -7.

13. UNIF. PROBATE CODE § 2-506 (1969). *But see* FLA. STAT. § 732.502(2) (2011) (not including state of domicile at death). Obviously, a will is also valid if executed in conformity with the laws of the situs.

14. SCHOENBLUM, *supra* note 3, at 14-25.

15. It is important to note that only the differences between positions on partial revocation, or differences in the events constituting a revocation by operation of law will significantly burden the revoking testator—not revocation by superseding will.

16. Indeed, historical differences in formal will requirements "have largely been removed by the adoption of uniform statutes . . . recognizing the validity of wills executed elsewhere." HAY, *supra* note 2, at 1302. The effect has been to decrease the likelihood of formal invalidation nationwide. *Id.*; see also SCHOENBLUM, *supra* note 3, at 14-9 ("[T]he number of jurisdictions looked to in establishing formal validity has in most states been increased, thus enhancing the likelihood that a will will be deemed valid.").

17. See SCHOENBLUM, *supra* note 3, at 14-26 ("State statutes that assume the formal validity of a will on the basis of compliance with the requirements of some other

statutes expressly deal with revocation, most refer only to execution.¹⁸ Even though there is a “clear link”¹⁹ between execution and revocation, the popular response to textual omission has been strict application of the common law.²⁰ That is, the default position taken by situs states is to apply situs law to ancillary revocation determinations when real property is at issue, even if a valid revocation has occurred pursuant to the requirements or events requisite in the domiciliary or state of execution.²¹

Repugnance from the situs default is grounded in its potential for objectionable outcomes. The default threatens to “upset[] the expectations of the testator and the policy of a sister state in giving effect to those expectations.”²² For instance, an act constituting a partial revocation in the domiciliary may fail to be the same under situs law. The situs may find the act ineffective to work a revocation or construe it to work a revocation *in toto*.²³ Similarly, an event deemed a revocation by operation of law in the state the event occurred may not operate as such under situs law.²⁴ In either situation, the testator’s expectations may be undermined. This possibility alone is good reason to abandon the situs default. Indeed, giving effect to the testator’s intentions is “of primary importance, the loadstar, cornerstone, [and] cardinal rule” of probate proceedings.²⁵

Some courts have managed to side-step inequitable outcomes by recognizing the commonsense correlation between execution and revocation.²⁶ Others, by reframing the issue, have demonstrated a simple willingness to deviate from common law application when it

jurisdiction usually do not apply to revocations of wills.”). Moreover, the UPC has failed to provide relief. *See id.* at 14-29.

18. Compare N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(b)(1) (McKinney 2011), with ALA. CODE § 43-8-135 (1991). However, even statutes that reference revocation do so in an inappropriate way—essentially codifying the common law situs rule. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(b)(1) (McKinney 2011).

19. SCHOENBLUM, *supra* note 3, at 14-29.

20. *See, e.g.*, First Presbyterian Church of Sterling, Ill. v. Hodge (*In re Barrie’s Estate*), 35 N.W.2d 658 (Iowa 1949).

21. *See id.* This is true even if the domicile has already determined that a revocation has occurred pursuant to domiciliary law. *See id.*; *see also* Thomas v. Taylor, No. C-000624, 2001 WL 992086 (Ohio Ct. App. Aug. 31, 2001).

22. Russell J. Weintraub, *An Inquiry Into the Utility of “Situs” as a Concept in Conflicts Analysis*, 52 CORNELL L. REV. 1, 28 (1966).

23. Compare True v. Funk (*In re Johannes’ Estate*), 227 P.2d 148, 152 (Kan. 1951) (limiting obliteration statute to revocation in toto), with Mechler v. Luettgerodt (*In re Mechler’s Will*), 16 N.W.2d 373, 379 (Wis. 1944) (“We concur in the conclusion of the trial court that the portion of the will through which lines have been drawn represent cancelled portions of the will and those bequests have been revoked.”).

24. *See, e.g.*, Thomas, 2001 WL 992086; Wimbush v. Wimbush (*In re Estate of Wimbush*), 587 P.2d 796, 797, 799 (Colo. App. 1978).

25. *In re Estate of Janney*, 446 A.2d 1265, 1266 (Pa. 1982).

26. *See Note, Choice of Law in Estates and Trusts*, 1969 U. ILL. L.F. 354, 359 & n.36 (1969).

would work unjust results.²⁷ The unfortunate exception: such “escape devices”²⁸ are not largely accepted. Without express authority to the contrary, revocation matters are generally cloaked blindly with the formalism²⁹ of the situs default.³⁰

However, the argument for abandoning the situs default does not end at inequitable results as the potential for unintended consequences imposes undue transaction costs upon the revoking testator. At a minimum, the testator wishing to give teeth to expressions of revocation is forced to comply with the laws of each state in which real property is owned. Furthermore, as foreign probate decrees are not entitled to full faith and credit under the Federal Constitution,³¹ the situs default is “inefficient because it requires multiple litigation” and encourages fraud and abuse.³² Such extraneous litigation imposes undue transaction costs and may lead to conflicting results.³³

The gravamen against the situs default, however, is even more commonsensical: there is no reason for its existence. There is no reason for modern choice-of-law validation statutes not to accommodate revocation. Applying situs law to revocations—and *only to revocations*—is without logic and inconsistent in the face of acquiescence which modern validation statutes have established for equally significant formality requirements. As revocation is simply “the converse of execution,”³⁴ the textualist approach commonly employed to interpret these statutes is unfounded: it is premised on “ancient distinction[s]”³⁵ that no longer hold firm in a contemporary society of increased economy and mobility.³⁶

Moreover, the situs default fails to further the state interests purportedly justifying its existence. The primary purpose of

27. See, e.g., *In re Estate of Janney*, 446 A.2d at 1266.

28. Hancock, *supra* note 1, at 38.

29. For a discussion on the role formalism plays in choice-of-law determinations, see Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925 (2004).

30. For an example, see *Baird v. Larson (In re Estate of Swanson)*, 397 So. 2d 465 (Fla. 2d DCA 1981), which “presents another example of blind application of situs law to a will contest.” Robby Alden, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEX. L. REV. 585, 615-16 (1987).

31. See *infra* cases accompanying notes 107, 113; see also *Stein v. Welch (In re Estate of Stein)*, 896 P.2d 740, 745 (Wash. Ct. App. 1995) (“[T]he state in which real property is located is not required to give full faith and credit to a decision of another state”); Recent Decisions, *Conflict of Laws—Wills—Decision by Court of Domicile That Devise of Realty Had Been Revoked Held Not Binding Upon Jurisdiction Where Realty Located*, 35 VA. L. REV. 642, 642 (1949) [hereinafter Recent Decisions].

32. Alden, *supra* note 30, at 607.

33. *Id.* at 607-08.

34. First Presbyterian Church of Sterling, Ill. v. Hodge (*In re Barrie’s Estate*), 35 N.W.2d 658, 666 (Iowa 1949) (Smith, J., dissenting).

35. *Id.* at 664 (Smith, J., dissenting).

36. See *id.* at 667 (Smith, J., dissenting); see also Stumberg, *supra* note 7, at 29.

revocation formalities is to protect against fraud.³⁷ However, the situs has a legitimate interest in protecting only *its own* citizens; protection for noncitizens is misplaced.³⁸

As a consequence, abandoning the situs default in revocation determinations is warranted. In its place, a more functional approach should be utilized. Instead of strict application of situs law, intent to revoke should be given effect if the testator has satisfied the formal requirements of the state most interested in the transaction.³⁹

Part II of this Note explores the burdens faced by a testator seeking to revoke a will of realty. Part III examines why these burdens are unnecessarily imposed. Lastly, Part IV suggests that a more functional approach would better serve as the default to revocation determinations.

II. THE SITUS DEFAULT IMPOSES BURDENS UPON THE REVOKING TESTATOR AND ADMINISTRATION PROCESS

A. *The Situs Default Imposes Risk of Undermining the "Polestar" of Administration: Realizing the Expectations of the Testator*

1. *The Meaning of Testamentary Expectations; Considerations of the Lay-Testator*

It is well-established that the "paramount duty" of probate proceedings is to effectuate the intentions of the testator.⁴⁰ Indeed, there is "no higher duty nor greater responsibility on the courts than that of seeing to it . . . that the will of the dead is honored. Knowledge in the living that this will be done affords a marked degree of solace and comfort in the afternoon and evening of life."⁴¹ The situs default undermines the ability of a court to fulfill this obligation. Before exploring this effect, however, some discussion on what intentions are justifiably threatened is warranted.

With regard to the revoking testator, intentions are pragmatically linked to expectations. In order to ascertain intention, one must first determine the expected consequences of an act or event of revocation. The issues thus arise: how does one best ascertain the intentions of a testator revoking a will of realty situated outside domiciliary borders and how are such intentions best effectuated? Perhaps it is best to begin with the familiar adage that "[e]very one is presumed to know

37. See Weintraub, *supra* note 22, at 28-29.

38. *Id.*

39. Note, *supra* note 26, at 359 ("[I]ntent to revoke should be given effect if the testator has satisfied the formal requirements of any state which is interested in the transaction."); see generally Weintraub, *supra* note 22.

40. *Morgenthaler v. First Atl. Nat'l Bank of Daytona Beach*, 80 So. 2d 446, 452 (Fla. 1955).

41. *Id.*

the law affecting his acts.”⁴² Coupled with the situs default, however, this maxim assumes knowledge of multiple laws—those of the domiciliary or state of execution, as well as every state in which the testator owns realty. To the extent applicable laws differ, this assumes too much.

In the absence of extrinsic evidence, it is impossible to ascertain the consequences actually intended when an act or event has ambiguous results. Indeed, just as words often have differing meanings in different jurisdictions,⁴³ so too can acts or events regarding revocation. For instance, not every state allows for partial revocation when a will is canceled, torn, or obliterated.⁴⁴ Similarly, a will is revoked upon the testator’s subsequent marriage in most states, but not all.⁴⁵ Therefore, by establishing a broad baseline from which to measure ambiguous acts or events, the situs default assumes that the testator intended potentially different consequences across jurisdictions. This may be the correct assumption, from time to time, but it surely cannot always be accurate.

The rules of testamentary construction have already dealt with the difficulties of establishing intent in the face of true ambiguity⁴⁶ by establishing a narrow baseline: domiciliary law.⁴⁷ That is, instead of assuming knowledge of every rule of construction potentially applicable to words, most courts construe a will under the “presumption that the maker of a will is more familiar with the law

42. Succession of Robert, 2 Rob. 427, 431 (La. 1842); *see also* Royce v. Estate of Denby, 379 A.2d 1256, 1258 (N.H. 1977) (acknowledging “the general presumption that a person is deemed to know and approve all dispositions and omissions in her will”).

43. *See, e.g.*, Easter v. Ochs, 837 S.W. 2d 516, 517-18 (Mo. 1992) (recognizing that the phrase “heirs of the body” may have differing meanings across jurisdictions).

44. *See infra* notes 58-65 and accompanying text.

45. *See infra* notes 77-78.

46. As used herein, “true ambiguity” refers to a situation where a testator’s intent is “either non-existent, or, if he had an intention, it is unknown and unknowable.” RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 327 (1971). Thus, a domiciliary baseline will only be applied “where there is no satisfactory evidence of the testator’s intentions.” *Id.*

47. *See* SCHOENBLUM, *supra* note 3, at 14-9 (“Even when the situs is determining the validity of a will disposing of personal property within its own borders, it will typically look to the law of the domicile at death.”); *see also* Santoli v. Louisville Trust Co., 550 S.W. 2d 182, 183-84 (Ky. Ct. App. 1977) (“A testator is presumed to know the law of his domicile at the time of his death, and it is presumed that he wishes his will to be executed pursuant to that law if language or circumstances do not otherwise indicate.”); *In re Estate of Pettit v. Levine*, 657 S.W.2d 636, 643 (Mo. Ct. App. 1983) (stating that “the testator’s intent is governed by the law of the testator’s domicile . . . whether it disposes of personalty or realty”); Hyman v. Glover (*In re Estate of Hannan*), 513 N.W.2d 339, 345 (Neb. Ct. App. 1994) (stating that the “‘true intention of the testator’” is “‘shown by the will itself, in the light of attendant circumstances under which it was made,’” and “[t]he place where the decedent lived can be considered an attendant circumstance.”) (quoting *Allemand v. Weaver*, 305 N.W.2d 7, 9 (Neb. 1981), *rev’d on other grounds*, 523 N.W.2d 672 (Neb. 1994). *But see* Ford v. Newman, 381 N.E.2d 392, 395-97 (Ill. App. Ct. 1978) (applying situs rules of construction).

of his domicile than with the law of other jurisdictions and that the will is written with the law of his domicile in mind,”⁴⁸ and “to apply any other law would be at great risk of defeating his intent.”⁴⁹

Fastening a similar baseline to revocation determinations is ostensibly more desirable than the wide berth of the situs default, but is still problematic. If we assume that a testator is most likely to be acquainted with domiciliary law, a domiciliary baseline is more persuasive than assuming the testator intended inconsistent consequences. Only “the domicile’s rule will be most likely to coincide with the actual intention of the testator,”⁵⁰ and it would therefore be wise to “avoid the absurdity”⁵¹ of construing acts or events differently in each situs.

On the other hand, though “desirable and seem[ingly] correct, . . . the assumption that [a] testator *actually knows* the law [of his domiciliary] seems fictitious.”⁵² Especially from the perspective of a lay testator, it is “highly unrealistic . . . to assume that [a testator] formulated any intention in terms of his domicile’s rule . . . a rule of which he is probably unaware.”⁵³ It is at this point the difference between intentions and expectations becomes problematic. Even if we assume that a testator *intended* for only domiciliary laws to apply, we cannot safely say that his *expectations* are destroyed by the application of a differing situs law. To the lay testator without sufficient knowledge to form accurate expectations, the application of either domiciliary or situs law could be equally inequitable.

It thus appears that hinging intention upon only those expectations justified in actual knowledge is too narrow to pass muster. If this is true, then it must be true that intention is also incapable of hinging upon the laws of several states. If we cannot assume knowledge of the domicile, how can we assume knowledge of the laws of each situs? To this end, one may argue that the situs default is justified on the basis of probabilities. That is, if expectations are based on inaccurate perceptions of the law, the application of differing laws may better ensure compliance with those expectations—realizing expectations, at least in part, is better than not at all. This may be true, but it seems to undermine the

48. *In re Estate of Pettit*, 657 S.W.2d at 643.

49. *Chappell v. Chappell* (*In re Chappell’s Estate*), 213 P. 684, 685 (Wash. 1923); see also WEINTRAUB, *supra* note 46, at 328.

50. WEINTRAUB, *supra* note 46, at 328.

51. *Id.*; see also *Ford*, 381 N.E.2d at 398 (Craven, J., dissenting).

52. 4 PAGE ON THE LAW OF WILLS § 30.13 (William J. Bowe & Douglas H. Parker, eds., 2004) (emphasis added).

53. WEINTRAUB, *supra* note 46, at 328. Even a testator who employs the services of an attorney may be unaware of applicable law. See *Baird v. Larson* (*In re Estate of Swanson*), 397 So. 2d 465, 468 (Fla. 2d DCA 1981) (acknowledging that “many people seeking legal advi[ce] or services may obtain that service free or at reduced cost from a relative or close friend who practices law in another state”).

“paramount duty”⁵⁴ of ascertaining the testator’s true intentions. If we assume a testator actually has an expectation, then this rationale threatens to realize it *only* in part.⁵⁵

As a consequence, neither a single law nor a set of laws is well suited to serve as the baseline from which to interpret the revoking testator’s intention. Therefore, neither should be favored.⁵⁶ Instead, the baseline “that should be applied is the law of the state predominantly concerned with the matters with which the issue of [revocation] deals.”⁵⁷ This allows for a narrower baseline than the situs default, but sidesteps the problems inherent in assuming testator intent. Further, this approach generally fastens domiciliary law as the baseline for judging expectations. The interests of the situs will “rarely, if ever,”⁵⁸ outweigh those of the domicile.

2. Revocation by Physical Act

Every state allows for revocation *in toto* through a physical act of the testator,⁵⁹ such as the canceling, tearing, obliterating, erasing, or cutting of a will. However, states are not uniform as to whether such acts may constitute a *partial* revocation.⁶⁰ Some states allow for partial revocation,⁶¹ but many do not.⁶² In states that do not, acts

54. *Morgenthaler v. First Atl. Nat’l Bank of Daytona Beach*, 80 So. 2d 446, 452 (Fla. 1955).

55. Moreover, the court’s ability to ascertain true intentions from the surrounding circumstances should not be overlooked. Sometimes it is simply clear what the testator wanted. *See, e.g., In re Estate of Janney*, 466 A.2d 1265, 1266 (Pa. 1982) (“In the instant case, it was her sister and her sister alone to whom the testatrix [intended to give].”).

56. *See* WEINTRAUB, *supra* note 46, at 328.

57. *Id.*

58. *See* Weintraub, *supra* note 22, at 16. *But see In re Estate of Garver*, 343 A.2d 817, 819 (N.J. Super. Ct. App. Div. 1975) (concluding that even though the testator “was a New Jersey domiciliary at the time of his death . . . in the special circumstances of this case justice requires . . . refrain[ing] from applying the New Jersey law of revocation” and applying the law of the state in which the divorce occurred instead).

59. *See generally* Annotation, *Effect of Testator’s Attempted Physical Alteration of Will After Execution*, 24 A.L.R.2d 514, Part V (1952).

60. *See supra* note 23. “[W]hether the physical alteration or mutilation of a part of a will operates to revoke the will in toto or only pro tanto is governed largely by the applicable statute, a partial revocation in most instances not being permissible unless the statute relates to revocation of the will, ‘or a part thereof,’ rather than just to revocation of the ‘will.’” Annotation, *supra* note 59, at 526.

61. For example, Wisconsin allows for partial revocation. *See Mechler v. Luettgerodt (In re Mechler’s Will)*, 16 N.W.2d 373, 379 (Wis. 1944) (“We concur in the conclusion of the trial court that the portion of the will through which lines have been drawn represent cancelled portions of the will and those bequests have been revoked.”). So does California, *Campbell v. Noll (In re Estate of Cumming)*, 158 Cal. Rptr. 263 (Ct. App. 1979) (testator validly revoked bequest to mother by lining out mother’s name in executed will), and New Jersey, *In re Danielly’s Estate*, 81 A.2d 519, 520 (Camden County Ct. 1951) (“It is well established that portions of a will may be cancelled by obliterating said portions with pencil or other marks.”). The Uniform Probate Code also embraces partial revocation. UNIF. PROBATE CODE § 2-507 cmt. (1969).

intended to be partial revocations will also be ineffective to revoke *in toto*⁶³ and thus fail to operate as revocatory at all.⁶⁴ As such, differing laws may undermine the intentions of the testator.⁶⁵

In *In re Barrie's Estate*,⁶⁶ the decedent, though domiciled in Illinois at the time of her death, owned real property in Iowa. Upon her death, an instrument purporting to be her will was offered for probate in Illinois, but was rejected. "[T]he instrument had the word 'void' written across its face in at least five places, including the attestation clause. Also, upon the cover and upon the envelope containing [the] same, appear[ed] the word 'void' written with the name 'M. E. Barrie' and 'Mary E. Barrie.'" ⁶⁷ The Illinois court affirmatively found that such acts constituted a revocation *in toto* under Illinois law and, therefore, that the decedent died intestate.⁶⁸ The same instrument was later presented for probate in Iowa.⁶⁹ Under Iowa law, however, such acts did not constitute a revocation.⁷⁰

62. For example, Kansas does not allow partial revocation by such acts. *True v. Funk (In re Johannes' Estate)*, 227 P.2d 148, 152 (Kan. 1951) ("We hold that under our statutes there can be no revocation of a part or parts of a will by burning, tearing, cancelling or obliterating such part or parts, with the effect that those portions become nullities and the remainder of the will stands.").

63. For example, in Oregon, "if a part of a will is burnt, torn, canceled, or obliterated by the testator . . . the act will be effective to revoke the will [in toto] if this was the intention of the testator But if the intent is only to revoke the mutilated portions of the will . . . the mutilations will be disregarded and the will as originally executed will be given effect." *Minsinger v. U.S. Nat'l Bank of Portland (In re Estate of Minsinger)*, 364 P.2d 615, 619 (Or. 1961). Colorado and Kansas also employ the same reasoning. *See Scheer v. First Nat'l Bank of Denver (In re Estate of Haurin)*, 605 P.2d 65, 66-67 (Colo. App. 1979); *In re Johannes' Estate*, 227 P.2d at 152.

64. *See, e.g., In re Johannes' Estate*, 227 P.2d at 152. For a will to be revoked in toto, it must have been the intent of the testator to do so. *See id.*; *In re Estate of Minsinger*, 364 P.2d at 619. As such, acts done with the intent to partially revoke cannot meet the intention requirements of revocation in toto. *See, e.g., Bd. of Nat'l Missions of the Presbyterian Church v. Sherry*, 23 N.E.2d 730, 733 (Ill. 1939) (finding that cancellation of portions of will by testator with intent to revoke parts thereof cannot amount to revocation of entire will).

65. As "[i]t is the intent with which the act is done that governs," interstate differences of interpreting intention may also play a role in undermining expectations. *In re Estate of Minsinger*, 364 P.2d at 619; *see also Presbyterian Church*, 23 N.E.2d at 732. For a discussion on the various standards used for the determination of intent, *see* Annotation, *supra* note 59, Part III. Moreover, interstate differences in the application of the doctrine of dependent relative revocation may also be relevant to expectations. *See id.* at Part VIII.

66. *First Presbyterian Church of Sterling, Ill. v. Hodge (In re Barrie's Estate)*, 35 N.W.2d 658 (Iowa 1949).

67. *Id.* at 660.

68. *Id.*; *see also In re Barrie's Will*, 65 N.E.2d 433, 438-39 (Ill. 1946).

69. *In re Barrie's Estate*, 35 N.W.2d at 660.

70. Compared to Illinois, canceling a will in Iowa requires conformity with more stringent formalities. *Compare* IOWA CODE § 633.284 (West, Westlaw through 2011 Legis. Sess.), *with* 755 ILL. COMP. STAT. ANN. 5/4-7 (West, Westlaw through P.A. 97-671 of the 2011 Reg. Sess.). Significantly, Iowa requires that for a valid revocation "by cancellation, the revocation must be witnessed in the same manner as the making of a new will." IOWA CODE ANN. § 633.284 (West, Westlaw through 2011 Legis. Sess.). Illinois, on the other

In holding that it was not bound by the judgment of the Illinois court, the Iowa court accepted the decedent's will into probate and found it determinative as to the devolution of real property situated in Iowa.⁷¹

The testatrix's expectations were clearly undermined by the Iowa court. It is surely safe to assume that even a layperson expects the legal effect of a will to be altered, at least to some extent, by destroying or cancelling it.⁷² Nonetheless, Illinois had a greater stake in seeing its laws applied. Illinois law was "designed primarily for the benefit of Illinois citizens."⁷³ In contrast, "when the Iowa legislature decided to require more stringent probative safeguards for a valid revocation, it must have been concerned primarily with the protection of Iowa testators and beneficiaries."⁷⁴ Therefore, because it was primarily the interests of an Illinois testatrix being protected, Illinois law should have governed the efficacy of the attempted revocation.⁷⁵

3. Revocation by Operation of Law

Certain events that change life's circumstances—such as marriage, divorce, or birth or adoption of a child⁷⁶—may have a revocatory effect upon a will by operation of law. However, the events or circumstances that constitute a revocation are not universal. For instance, some states call for revocation upon the testator's marriage subsequent to execution⁷⁷ while others do not.⁷⁸ Similarly, while nearly every state calls for revocation upon the subsequent divorce of the testator,⁷⁹ at least one might not.⁸⁰ As "these forms of revocation involve matters of primary concern to the domicile,"⁸¹ domicile laws should generally govern. Therefore, because current framework mandates that situs law determines "whether particular

hand, requires only an intent to cancel in toto. *See In re Barrie's Will*, 65 N.E.2d at 436; *Presbyterian Church*, 23 N.E.2d at 732.

71. *In re Barrie's Estate*, 35 N.W.2d at 663.

72. *Hancock*, *supra* note 1, at 3.

73. *Id.*

74. *Id.*

75. *See id.* at 3-4.

76. *See, e.g.*, KAN. STAT. ANN. § 59-610 (West, Westlaw through 2011 Legis. Sess.); MD. CODE ANN., EST. & TRUSTS § 4-105 (LexisNexis 2001); 20 PA. CONS. STAT. ANN. § 2507 (West 1975).

77. *See, e.g.*, NEV. REV. STAT. § 133.110 (1993); R.I. GEN. LAWS § 33-5-9 (1995).

78. *See* COLO. REV. STAT. ANN. § 15-11-508 (West, Westlaw through Ch. 1 of the 2d Legis. Sess. 2012); FLA. STAT. § 732.507 (2011); KY. REV. STAT. ANN. § 394.090 (LexisNexis 1999); OHIO REV. CODE ANN. § 2107.37 (West, Westlaw through 2012 File 74 of the 2011-2012 Legis. Sess.).

79. *See, e.g.*, UNIF. PROBATE CODE § 2-508 (1969); FLA. STAT. § 732.507(2) (2011).

80. In Mississippi, a divorce does not automatically work a revocation by operation of law. *See* MISS. CODE ANN. § 91-5-3 (West 1999); *Hinders v. Hinders*, 828 So. 2d 1235, 1238-45 (Miss. 2002). But it may constitute a revocation implied at law depending on the circumstances. *See* *Rasco v. Estate of Rasco*, 501 So. 2d 421, 423-24 (Miss. 1987); *McKnight v. McKnight*, 267 So. 2d 315, 316-17 (Miss. 1972).

81. *HAY*, *supra* note 2, at 1296.

circumstances or events will have a revocatory effect upon [a] will,”⁸² testamentary expectations are threatened.

In *In re Estate of Lans*,⁸³ the decedent was a New York domiciliary. Prior to his death, he obtained a divorce from his wife in Florida.⁸⁴ Under Florida law, a divorce procured subsequent to execution of a will nullifies any testamentary benefit to the surviving party to the divorce.⁸⁵ Nonetheless, when his will was admitted into a New York court for administration, his ex-wife sought an interest in his estate as a named beneficiary to his will.⁸⁶ Ignoring the policy considerations at hand, the New York court applied New York law in determining whether the ex-wife was a beneficiary under the will.⁸⁷ At the time, a divorce did not operate as a revocation under New York law.⁸⁸ The New York court consequently found that the ex-wife was a proper party to the proceeding and could recover under the will.⁸⁹

In applying situs law to this revocation determination, the New York court upset the expectations of all parties involved. As explained by Professor Hay:

In determining an appropriate property settlement on divorce, the parties and the courts will naturally consider the law of the state of the current domicile as the background for their conclusions. A statute of that state revoking a testamentary provision in favor of the former spouse is a guard against an unintended double portion. Upon a subsequent change of domicile prior to death, for a court to apply a governing law other than the domicile at time of the divorce may permit a double portion contrary to the expectation of all parties to the divorce⁹⁰

Thus, Florida law should have governed New York’s determination. Even if done so implicitly, the ex-wife received her portion of the estate when Florida law was applied to the prior divorce proceedings. As New York law had no interest in guarding

82. Annotation, *Conflict of Laws Respecting Revocation of Will*, 9 A.L.R.2d 1412, 1424 (1950).

83. 210 N.Y.S.2d 611 (N.Y. Sur. Ct. 1960). *In re Estate of Lans* deals with personal property, but is nonetheless demonstrative of how the desire to apply situs law may lead to unintended results.

84. *Id.* at 612.

85. *Id.* at 613; see also FLA. STAT. § 732.507(2) (2011).

86. *In re Estate of Lans*, 210 N.Y.S.2d at 612.

87. *Id.* at 613-16.

88. See *id.* at 613. New York law now mandates revocation upon a divorce subsequent to revocation. See N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (McKinney 2008). Nonetheless, *In re Estate of Lans* is still probative of the ill effects of the situs default upon determinations of revocation by operation of law in general. There are still differences in other operation of law regimes (besides divorce). See *supra* notes 76-78 and accompanying text.

89. *In re Estate of Lans*, 210 N.Y.S.2d at 616.

90. HAY, *supra* note 2, at 1306.

against an “unintended double portion,”⁹¹ applying New York law worked an “injustice by frustrating the clear expectations of [the] testator.”⁹²

In *In re Estate of Wimbush*,⁹³ the decedent died domiciled in Hawaii but owning real property in Colorado. A Hawaiian court found that the decedent died intestate because his “marriage to his wife subsequent to [his] will’s execution revoked [his] will by operation of law” under Hawaiian law.⁹⁴ The decedent’s wife then petitioned for an adjudication of the decedent’s intestacy in a Colorado ancillary proceeding.⁹⁵ Because the Hawaiian proceeding lacked serious due process concerns, the Colorado court correctly rejected the Hawaiian decree under the principles set forth in *Mullane v. Central Hanover Bank & Trust Co.*⁹⁶ However, the Colorado court applied its *own* laws as to revocation.⁹⁷ Since a marriage subsequent to execution does not operate as a revocation under Colorado law, the Colorado court ruled that the decedent died testate and that his will governed the devolution of real property situated in Colorado.⁹⁸

The Colorado court recognized that always applying situs law may undermine “the policy of promoting [the] decedent’s expectations.”⁹⁹ Nevertheless, the court found that deviation from the situs default should be limited to only “unusual circumstances.”¹⁰⁰ As *In re Estate of Wimbush* shows, it is precisely this rigidity that leads to inequity.

Laws that revoke a will upon marriage operate “as a family protection device.”¹⁰¹ As a testator is usually domiciled in the same state as his or her family, it is “the domiciliary [that] normally has the dominant interest.”¹⁰² Indeed,

Colorado had no legitimate interest that justified applying its laws to determine the validity of the will or the intestate shares of the decedent’s heirs. None of the parties in interest resided in

91. *Id.*

92. *In re Estate of Garver*, 343 A.2d 817, 819 (N.J. Super. Ct. App. Div. 1975) (concluding divorce is a “special circumstance[]” requiring deviation from common law).

93. *Wimbush v. Wimbush* (*In re Estate of Wimbush*). 587 P.2d 796, 797 (Colo. App. 1978).

94. *Id.*

95. *Id.*

96. 339 U.S. 306 (1950). For support that Colorado correctly rejected the Hawaiian decree for lack of due process, see Alden, *supra* note 30, at 617.

97. *In re Estate of Wimbush*, 587 P.2d at 799.

98. *Id.*; see also COLO. REV. STAT. ANN. § 15-11-508 (West, Westlaw through Ch. 1 of the 2d Legis. Sess. 2012).

99. *In re Estate of Wimbush*, 587 P.2d at 799.

100. *Id.* The Colorado court found that no such “unusual circumstances” were present in *In re Estate of Wimbush*. *Id.* (finding a lack of “unusual circumstances or predomination of contacts in Hawaii that would justify deviation from the favored *lex sitae*.”).

101. HAY, *supra* note 2, at 1306.

102. *Id.*

Colorado, and no land policy of the situs was protected by the Colorado laws on will validation or intestacy.¹⁰³

B. Situs Default Imposes Undue Transaction Costs—Exacerbated by Uncertainty

At a minimum, the situs default forces the revoking testator to comply with the laws of each state in which real property is owned.¹⁰⁴ The costs associated with this inconvenience may be exacerbated by uncertainty.¹⁰⁵ For instance, the validity of a revocation *pro tanto* is uncertain to the extent a testator may acquire new realty in another state in the future.¹⁰⁶ If the laws of that state differ from those taken into account during the revocation process, the transaction costs incurred will be for nothing.

C. Full Faith and Credit

It is well settled that “wills probated in the state of domicile relating to real property in another are not entitled to the protection of the full faith and credit clause of the Federal Constitution.”¹⁰⁷ However, regardless of whether this is a sound principle of constitutional law,¹⁰⁸ it does not *mandate* the situs to disrespect the judgments of its sister states.¹⁰⁹ Indeed, “there seems no reason why

103. Alden, *supra* note 30, at 617.

104. The inconveniences in making devolutions of real property, in and of themselves, should also be noted. “The inconvenience is greater than an inter vivos transfer because land scattered in several states can be deeded by separate instruments, while the will is generally but a single instrument.” HAY, *supra* note 2, at 1295.

105. It is also worth noting that reducing “uncertainty of title” is one of the reasons validation choice-of-law statutes were enacted. Recent Decisions, *supra* note 31, at 642; *see also In re Estate of Wimbush*, 587 P.2d at 799. Thus, as revocation and execution are linked, the existence of uncertainty in the realm of revocation undermines legislative intent. *See infra* Part III.A.1.

106. Some states do not allow partial revocation. *See, e.g., supra* note 62.

107. Recent Decisions, *supra* note 31, at 642; *see also* Phillips v. Phillips, 104 So. 234, 236 (Ala. 1925) (stating that it is the situs’ “right” to govern wills to lands); Trotter v. Van Pelt, 198 So. 215, 217 (Fla. 1940) (finding that foreign decrees “establish nothing beyond the limit of the State where the probate took place”); Stein v. Welch (*In re Estate of Stein*), 896 P.2d 740, 745 (Wash. Ct. App. 1995) (“[T]he state in which real property is located is not required to give full faith and credit to a decision of another state regarding probate of such real property.”).

108. Though routine, failing to extend full faith and credit to nonsitus decrees affecting realty is nevertheless questionable. *See* Weintraub, *supra* note 22, at 10-16. Surely a nonsitus state is equally qualified to satisfy due process requirements. Alden, *supra* note 30, at 595. “Moreover, it is simply not true that the non-situs forum is always an extremely inappropriate forum to adjudicate the interests in realty of persons before it.” Weintraub, *supra* note 22, at 15. This is especially so in the face of the illogical justifications traditionally set forth. For instance, “it is circular to talk in terms of full faith and credit not being owed to non-situs decrees affecting interests in land because the decreeing court lacks subject-matter jurisdiction. If full faith and credit were required, the non-situs court would have subject-matter jurisdiction.” *Id.* at 12 (emphasis added).

109. *See* Weintraub, *supra* note 22, at 11.

the situs should not, [at least in appropriate cases], sustain the [expressions] of the testator by the law of his domicile.”¹¹⁰ The “exercise of jurisdiction by the nonsitus court satisfies due process and ‘pose[s] no real threat to the legitimate interest of the situs state.’”¹¹¹ Moreover, in regards to revocation decrees, refusing to give full faith and credit is inconsistent with most validation statutes establishing a policy of acquiescence for the formalities of sister states.¹¹²

Nevertheless, situs states consistently refuse to bless foreign probate decrees with full faith and credit.¹¹³ Often, therefore, the situs default “forces litigants to go to court in more than one state.”¹¹⁴ This separation of litigation imposes unnecessary transaction costs on administration. It may also lead to “unreprovable fraud and abuse. It enables and encourages a party to submit to litigation in a nonsitus jurisdiction and later collaterally attack an unfavorable judgment at the situs.”¹¹⁵

The situs default is thus “inefficient,”¹¹⁶ but is also superfluous as applied to revocation. There are no legitimate situs interests that justify always applying situs law.¹¹⁷ But even if there were, surely they would be furthered only when foreign law differs from situs law. However, even when domiciliary and situs laws are the same, the situs default leaves open the possibility for collateral attack in the situs.

110. HAY, *supra* note 2, at 1294.

111. Alden, *supra* note 30, at 609 (quoting Brainerd Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 629 (1954)) (alteration in original).

112. See Gailey v. Brown (*In re Gailey's Will*), 171 N.W. 945, 947 (Wis. 1919).

113. See, e.g., Clarke v. Clarke, 178 U.S. 186, 192 (1900) (holding that a decision by the courts of the domicile of a testatrix that her will worked a conversion into personalty of all her real property, wherever situated, is not conclusive upon the courts of a sister state in respect to the effect of the will upon the title to real property in that estate); Baird v. Larson (*In re Estate of Swanson*), 397 So. 2d 465, 466 (Fla. 2d DCA 1981) (holding “that appellants have the right to attack [a] Georgia will in a Florida court, on substantive grounds, based on their interest in . . . real property located in Florida”); First Presbyterian Church of Sterling, Ill. v. Hodge (*In re Barrie's Estate*), 35 N.W.2d 658, 661 (Iowa 1949) (“[F]ull faith and credit . . . does not render foreign decrees of probate conclusive as to the validity of a will, as respects real property situated in a state other than the one in which the decree was rendered, nor does the doctrine of res adjudicate or estoppel by judgment apply.”); Marr v. Hendrix, 952 S.W.2d 693, 695 (Ky. 1997) (“To permit a contest of a foreign will in another state, where the real estate affected by the will is located, does not violate full faith and credit required under the Federal Constitution.” (internal quotations omitted)).

114. Alden, *supra* note 30, at 608.

115. *Id.* But see Cuevas v. Kelly, 873 So. 2d 367, 372 (Fla. 2d DCA 2004) (holding that res judicata bars—via full faith and credit—collateral attack on domiciliary determinations with respect to individuals who were parties to the previous action or received adequate notice thereof).

116. Alden, *supra* note 30, at 607.

117. See *infra* Part III.B.

III. THE BURDENS IMPOSED BY THE SITUS DEFAULT ARE WITHOUT JUSTIFICATION

As we have seen, the situs default imposes burdens upon the revoking testator. It threatens his expectations and imposes unnecessary transaction costs upon estate administration. Now comes the gravamen for abandonment: there is no reason for the situs default to exist. Its existence is both illogical and unjustified.

A. *Choice-of-Law Validation Statutes Should Accommodate Revocation*

As previously stated, modern validation statutes have alleviated common law execution concerns, but have not shielded issues of revocation from inconsistent outcomes or inconveniences. But there is no reason they should not. That most refer only to execution is irrelevant: execution and revocation are inextricably linked. Excluding revocation is thus an illogical statutory construction premised on archaic distinctions.

1. *Textualism Is Not the Proper Construction: Execution and Revocation Are Clearly Linked*

Modern validation statutes are commonly interpreted narrowly, limiting common law deviation to instances of express authorization and leaving the situs default intact as applied to revocation.¹¹⁸ For example, in *In re Barrie's Estate*, the testatrix's will was executed and subsequently revoked pursuant to the laws of her Illinois domicile.¹¹⁹ The court found that the Iowa validation statute—which gave effect to a foreign will if executed in compliance with the laws of the decedent's domicile or state of execution—validated her will for purposes of probate in Iowa.¹²⁰ However, the court failed to also accommodate her revocation under this statute even though the revocation was valid pursuant to the same laws that gave her will force in Iowa in the first instance.¹²¹ In reaching this result, the court narrowly interpreted Iowa's validation statute, stating that the statute “is clearly a modification of the common law and should not be extended to include matters not clearly included therein. It

118. See *Wimbush v. Wimbush* (*In re Estate of Wimbush*), 587 P.2d 796, 798-99 (Colo. App. 1978); *In re Barrie's Estate*, 35 N.W.2d 658, 663 (Iowa 1949); *Prestie v. Prestie* (*In re Estate of Prestie*), 138 P.3d 520, 523 (Nev. 2006) (“Statutes governing the revocation of wills are strictly construed.” (quoting *Todora v. Todora*, 554 P.2d 738 (Nev. 1976))); *In re Estate of Lans*, 210 N.Y.S.2d 611, 613 (N.Y. Sur. Ct. 1960); *Thomas v. Taylor*, No. C-000624, 2001 WL 992086 (Ohio Ct. App. Aug. 31, 2001); SCHOENBLUM, *supra* note 3, at 14-26. *But see In re Traversi's Estate*, 64 N.Y.S. 2d 453 (N.Y. Sur. Ct. 1946).

119. *In re Barrie's Estate*, 35 N.W.2d at 660.

120. *Id.*

121. *See id.* at 660-63.

specifically deals with the formalities in the execution of the will, and nothing more.”¹²² But such textualism is illogical. “[N]o rational distinction can be drawn, in this context, between rules prescribing the mode of making wills and those prescribing the mode of revoking them. Both types of rules serve the same purpose: the establishment of techniques by which a testator can communicate his wishes to the judge.”¹²³

Even more fundamental, in order for the situs to declare a foreign will valid, the testator has to actually have a valid foreign will!¹²⁴ “[S]ince a will is ambulatory until death, a determination of whether it has or has not been revoked is essential to a decision regarding its admission to probate.”¹²⁵ Indeed, revocation is

merely the converse of execution. The power to execute implies the power to revoke. A will can no longer be said to be *executed* after it has been *revoked*. Whether an instrument is a will is determined not only by the manner of its execution but also by the manner of its attempted revocation. Both acts are a part of the testamentary process.¹²⁶

Furthermore, a narrow interpretation simply does not coincide with the legislative motivations underlying the enactment of validation statutes. It undermines a clear purpose for their enactment—to ease the testator’s burden.¹²⁷ It is also inconsistent with the statutes’ acquiescence for equally significant formality requirements. Given the clear connection between execution and revocation, it would be “unthinkable that [a] legislature intended to require recognition of the laws of another jurisdiction in the matter of one and not of the other.”¹²⁸ Best argued by Professor Hancock:

It would [be] absurd for the lawmaker to say (in effect) to the foreign testator, ‘For your convenience we shall recognize your will as valid if made in compliance with our law, the law of your

122. *Id.* at 663.

123. Hancock, *supra* note 1, at 6-7.

124. See *In re Barrie’s Estate*, 35 N.W.2d at 665 (Smith, J., dissenting) (stating that Iowa’s validation statute is “valid in ascertaining what effect is to be given the instrument once it has been found to be a will. . . . Before that question is reached[, however,] it must first be established that it is in fact the will of [the testator].”); *Gailey v. Brown* (*In re Gailey’s Will*), 171 N.W. 945, 947 (Wisc. 1919) (stating that it is first necessary to determine “whether or not [the] testator made a valid will, and, if so, whether it [has] been legally revoked before his death”).

125. Recent Decisions, *supra* note 31, at 643; see also *In re Culley’s Will*, 48 N.Y.S.2d 216, 225 (N.Y. Sur. Ct. 1944) (“[I]f a will is ambulatory for one purpose, it should be for all purposes.”).

126. *In re Barrie’s Estate*, 35 N.W.2d at 666-67 (Smith, J., dissenting).

127. “The motivation for looking beyond situs law has been the sensible attitude that a testator should not be required, each time he acquires real property in another foreign jurisdiction, to execute a will in order to comply with minor technical formalities of the situs’ wills law.” SCHOENBLUM, *supra* note 3, at 14-4.

128. *In re Barrie’s Estate*, 35 N.W.2d at 667 (Smith, J., dissenting).

domicile, or the law of the place of making. But if you decide to revoke that will you can only do so in the mode prescribed by our law.’¹²⁹

A few courts have recognized this disconnect between textualism and legislative intent. In *In re Traversi's Estate*,¹³⁰ the testator executed a will while domiciled in New York. He subsequently moved to, and became domiciled in, Virginia.¹³¹ While in Virginia, he attempted to partially revoke his will.¹³² This was evidenced by lines drawn through separate paragraphs of typewritten matter.¹³³ Further, “in the margin opposite such obliterated paragraph[s] was] a notation in the writing of [the] deceased saying: ‘Cancelled A. G. T.’”¹³⁴ On the day the decedent carried out these acts, they constituted a partial revocation under Virginia law.¹³⁵ Subsequent to these acts, the decedent reestablished his domicile in New York, where he ultimately died.¹³⁶ Upon his death, his will was admitted into probate in a New York court. It was clear that the acts of the decedent were “wholly ineffectual under New York law” to accomplish a partial revocation.¹³⁷ Nonetheless, the court found that the will was partially revoked vis-à-vis Virginia law.¹³⁸

At the time, New York’s validation statute directed admission into probate of a foreign will “if the execution followed the mode prescribed in the place where [it was] executed or where the testator was domiciled.”¹³⁹ The court recognized that the policy underlying this statute was one of effectuating testamentary intent,¹⁴⁰ and reasoned that it would undermine this policy to effectuate execution but not revocation:

Our statutes say that a will must be admitted to probate here if executed with the formalities required by the law of the testator’s domicile. [If] a testator after executing such a will thereafter partially revokes it by an act which operates under the law of his then domicile as an immediate partial revocation our courts cannot say that they will recognize the first testamentary act and refuse

129. Hancock, *supra* note 1, at 7.

130. 64 N.Y.S.2d 453, 455 (N.Y. Sur. Ct. 1946).

131. *Id.*

132. *Id.* at 455-56.

133. *Id.* at 455.

134. *Id.*

135. SCHOENBLUM, *supra* note 3, at 14-26 to -27.

136. *In re Traversi's Estate*, 64 N.Y.S.2d at 455.

137. *Id.* at 456.

138. *Id.* at 459-60.

139. *Id.* at 456.

140. *Id.* at 459 (validation statute requires court to “validate [a] testamentary plan”); see also SCHOENBLUM, *supra* note 3, at 14-27.

to give effect to the second one. Neither logic nor reason would support such a policy.¹⁴¹

Similarly, in *In re Gailey's Will*, the Wisconsin Supreme Court reasoned that the “necessary result of these statutes . . . is that the primary inquiry of determining as to the form and mode of the execution of foreign wills devising real estate . . . and the lawful power of the testator to make such a will is committed to [a foreign state].”¹⁴² And this inquiry necessarily includes whether a will is valid under foreign law, and, if so, whether it has been revoked under the same.¹⁴³

As these two cases show, including only the actual formalities of execution within the word “execution” is too narrow an interpretation.¹⁴⁴ “If full effect is to be given to [validation statutes], the word ‘execution’ should be interpreted to encompass all questions concerned with the validity of the will and not merely those concerned with its execution.”¹⁴⁵

2. *Textualism Inappropriately Premised on “Ancient Distinctions”*

Failing to include revocation under modern validation statutes is also unsound because it is premised on outdated distinctions between real and personal property. Specifically, forcing situs law upon only immovables is misplaced. The origin for evoking domiciliary law for determinations regarding movables

has as its bases tradition and ideas of policy or expediency. Originally, on the continent of Europe and in England movables were said to follow the person of the owner so that both transactions inter vivos and matters of succession were generally stated to be governed by the domiciliary law. The fiction of domiciliary situs is apt to coincide with actual situs in a society with limited economy since in such a society a person's chattels are likely to be located at the place where he lives.¹⁴⁶

But this rationale no longer holds firm in our society of increased economy and mobility.¹⁴⁷ Some people, if not most, will at some point

141. *In re Traversi's Estate*, 64 N.Y.S.2d at 459. Compare *id.*, with *First Presbyterian Church of Sterling, Ill. v. Hodge (In re Barrie's Estate)*, 35 N.W.2d 658, 660-63 (Iowa 1949) (declining to apply the revocation laws of a foreign state).

142. 171 N.W. 945, 947 (Wis. 1919).

143. *Id.*

144. Recent Decisions, *supra* note 31, at 643.

145. *Id.*; see also *In re Barrie's Estate*, 35 N.W.2d at 668 (Smith, J., dissenting) (finding that because a will is ambulatory until death, “anything done to the instrument by the testator affecting its status as a will is to be considered in determining whether [the testator] has finally executed it”).

146. Stumberg, *supra* note 7, at 29.

147. See *id.*

move away from their domiciliary jurisdiction¹⁴⁸ leaving behind personal property—including intangible property, which could be located anywhere.¹⁴⁹ Nevertheless, such a move still empowers the testator's new domiciliary with jurisdiction over *foreign* property.

After such misplaced acquiescence, it is unfounded to claim exclusive entitlement to determinations affecting only realty. "Whatever the form of property, the same formalities for executing and revoking are required [by the situs]."¹⁵⁰ And under modern validation statutes, the situs will recognize the validity of a foreign will probated or executed pursuant to the laws of a foreign state, regardless of whether real or personal property is affected.¹⁵¹ Adhering to the "ancient distinction[s]" between immovables and movables "overlook[s] the profound effect of modern probate statutes that have entirely eliminated any old differences in formal requirements and solemnities as to mode of execution (and revocation) and probate procedure between 'wills of personalty' and 'wills of realty,' as they were formally referred to."¹⁵²

Apart from being a mere continuance of an archaic distinction, it has also been claimed that it is simply the "inherent right of every sovereign state, for its own security and in keeping with its dignity and independence, to regulate the alienation, devise, [and] descent of real estate within its borders."¹⁵³ But this is also unpersuasive to justify the distinction. "The same could be said about all property, both movable and immovable, and yet those who jealously guard a state's control over real property within its borders do not assert that such exclusive control must be maintained over personal property, or even persons."¹⁵⁴

B. The Situs Default Fails to Further the State Interests Purportedly Justifying its Existence

"Neither logic nor reason" supports a policy giving effect to execution but not revocation.¹⁵⁵ This becomes clearer when married to an additional submission: it is simply not true that situs law must *always* be applied to revocations in order to protect legitimate state

148. Perhaps everyone will move to Florida? "Due to the attractiveness of life in Florida to both retirees and nonretirees, Florida's population is increasing at a rapid rate." Baird v. Larson (*In re Estate of Swanson*), 397 So. 2d 465, 467 (Fla. 2d DCA 1981).

149. *In re Barrie's Estate*, 35 N.W.2d 658, 667 (Iowa 1949) (Smith, J., dissenting) ("Foreign ownership of property has become common.").

150. *Id.* at 665.

151. *Id.*

152. *Id.* at 664.

153. *Phillips v. Phillips*, 104 So. 234, 236 (Ala. 1925).

154. Alden, *supra* note 30, at 594.

155. *In re Traversi's Estate*, 64 N.Y.S.2d 453, 459 (N.Y. Sur. Ct. 1946).

interests.¹⁵⁶ Significantly, the situs has no legitimate interest in safeguarding noncitizens against fraud.¹⁵⁷ Applying situs revocation formalities—the purpose of which is to protect intent by safeguarding against fraud—thus fails to further the state interests they were designed to protect.¹⁵⁸ The situs only has an interest in protecting its own citizens; extension to noncitizens is “misplaced paternalism.”¹⁵⁹

Other justifications for the strict application of situs law are similarly mislaid.¹⁶⁰ For instance, one time-honored justification states that application of situs law is appropriate because the situs has an interest in protecting the integrity and effectiveness of its title recording systems.¹⁶¹ But revocation and title accuracy are distinct! Not applying situs law to revocation determinations in no way prevents the situs “from applying its law to protect bona fide purchasers, just as the situs state would in a purely domestic transaction.”¹⁶² Application of foreign law informs only who *receives* the situs’ realty, not *how* it will be recorded upon devolution. Consequently, applying foreign law “will not lead to inconvenience or result in the insecurity of land titles.”¹⁶³ Title searchers may still consult only situs law with respect to this issue.¹⁶⁴

Of course, there are some situations in which application of situs law would further legitimate state interests.¹⁶⁵ For instance, the situs has a legitimate interest in ensuring the proper use and free circulation of its land.¹⁶⁶ It may also have a legitimate interest in protecting its creditors.¹⁶⁷ However, having a more “dominant interest”¹⁶⁸ in some situations does not justify applying situs law to every situation. Even in the rare instances in which situs interests

156. See Weintraub, *supra* note 22, at 28.

157. Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, 1297 n.29 (1992).

158. See Weintraub, *supra* note 22, at 28.

159. *Id.* Moreover, modern validation statutes do not protect against fraud in the execution. This is additional evidence of a lack of a legitimate interest in protecting noncitizens against fraud. If the situs’ interests were truly legitimate, why would the legislature forgo an opportunity to further it? And even if an interest did exist, surely it is no more legitimate in the realm of revocation than execution.

160. For further discussion on the faulty presumptions upon which the traditional justifications in support of the *lex situs* are premised, see Alden, *supra* note 30, at 591-98.

161. See *id.* at 592; see also *Wimbush v. Wimbush (In re Estate of Wimbush)*, 587 P.2d 796, 799 (Colo. App. 1978); *Olson v. Weber*, 187 N.W. 465, 467 (Iowa 1922); *Marr v. Hendrix*, 952 S.W.2d 693, 695 (Ky. 1997); *In re Estate of Janney*, 446 A.2d 1265, 1266 (Pa. 1982); *In re Estate of Briggs*, 134 S.E.2d 737, 740 (W. Va. 1964); Weintraub, *supra* note 22, at 3-5.

162. Alden, *supra* note 30, at 592; see also Weintraub, *supra* note 22, at 11.

163. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239 cmt. e (1971).

164. See *id.*

165. See *id.* at cmts. b, f.

166. See *id.*; see also Alden, *supra* note 30, at 595-96.

167. *E.g.*, *Prestie v. Prestie (In re Estate of Prestie)*, 138 P.3d 520, 523 (Nev. 2006).

168. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239 cmt. b (1971).

are dominant, it will be “at least debatable” whether they sufficiently outweigh the “very great national need” for honoring the expectations of sister states.¹⁶⁹ This is particularly true when the conflict is between differing revocation laws. As stated earlier, some revocation laws may operate as a “family protection device,” of which the domicile normally has the dominant interest.¹⁷⁰ Therefore, situs interests are better protected “through a disciplined, jurisprudentially sound approach of interest analysis and not through the rote recitation of an inflexible ‘rule.’”¹⁷¹

IV. FUNCTIONAL APPROACH

The situs default should not be used to determine whether a foreign will has been revoked. Instead of rigid application of situs law, the situs should balance its own interests against those of interested foreign states as well as the ascertainable expectations¹⁷² of the revoking testator.¹⁷³ Under this functional approach, intent to revoke should be given effect if the testator has satisfied the formal requirements of the state which is most interested in the transaction.¹⁷⁴ To some extent, this approach has been advanced by the *Restatement (Second) of Conflict of Laws*:

The courts of the situs [will] usually apply their own local law in deciding [issues of revocation]. Sometimes, however, these courts would apply the local law of another state. . . . [This may be] on the ground that the concern of that state in the decision of the particular issue is so great as to outweigh the values of certainty and convenience which application of their own law would achieve.¹⁷⁵

169. Weintraub, *supra* note 22, at 11.

170. HAY, *supra* note 2, at 1306. *But see In re Estate of Garver*, 343 A.2d 817, 819 (N.J. Super. Ct. App. Div. 1975).

171. Alden, *supra* note 30, at 596. This principle is a motivating factor upon which a functional approach is urged. *See infra* Part IV.

172. As we have seen, the testator's justifiable expectations are tied to the law of the predominantly interested state. *See supra* Part II.A.1.

173. Public policy issues should also be balanced. “The traditional test used to determine whether the public policy of the forum prevents the application of [the situs default] is whether application of the foreign law will violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonweal.” *Buresh v. First Nat'l Bank (In re Estate of Seman)*, 500 P.2d 1063, 1065-66 (Or. Ct. App. 1972).

174. Note, *supra* note 26, at 359. *See generally* Weintraub, *supra* note 22.

175. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239 cmt. i (1971). However, this approach is only quasi-functional because situs law is still the default. Nonsitus law is applied only “sometimes.” *Id.* As we have seen, such an approach has caused inconsistencies. *Compare Wimbush v. Wimbush (In re Estate of Wimbush)*, 587 P.2d 796, 799 (Colo. App. 1978) (deviating only under “unusual circumstances”), *with In re Estate of Janney*, 446 A.2d 1265, 1266 (Pa. 1982) (finding situs formalism is sound, but not applying situs law to further clear expectations).

In balancing the interests, however, those of the situs will almost never be dominant in revocation determinations.¹⁷⁶ Indeed, once the “false dogmas” of the situs default are “consigned to the bonfire, it becomes apparent that proper solution of the choice-of-law problem will rarely, if ever, result in the application of the law of the situs”¹⁷⁷ At least to some extent, this has also been recognized by the *Restatement (Second) of Conflict of Laws*:

[W]here a testator, domiciled in state X, owns land in state Y and where under X local law a will is revoked by subsequent marriage or divorce. . . . [T]he Y courts might feel that X has the primary concern in determining whether a will has been revoked under such circumstances and that consequently X local law should be applied.¹⁷⁸

Moreover, a functional approach will not unduly burden the situs. As we have seen, the situs default fails to further the interests purported for its existence.¹⁷⁹

V. CONCLUSION

Application of the common law situs rule to revocation determinations imposes undue burdens upon the revoking testator owning realty beyond domiciliary borders. These burdens are unfounded in reason, lack legitimate justification, and accommodate the very harms legislation intended to cure. As a consequence, the situs default should be abandoned. In its place, a functional approach should serve as the starting point for choice-of-law determinations. This approach will more likely coincide with testamentary expectations while leaving legitimate situs interests unscathed.

176. Weintraub, *supra* note 22, at 16.

177. *Id.*

178. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239 cmt. i (1971); *see also In re Estate of Garver*, 343 A.2d 817, 819 (N.J. Super. Ct. App. Div. 1975).

179. *See supra* Part III.B.

